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## PARENTAGE: A COMPARATIVE STUDY OF ISLAMIC AND PAKISTANI LAW

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### Abstract

Parentage is one of the basic and most important rights of a child on which all her other rights depend. A child's rights, like inheritance, guardianship and maintenance are affected by her parentage. Islamic law and Pakistani law give this right its due importance. Parentage includes paternity and maternity of the child. In Islamic law paternity of a child is more important as it is established only for a legitimate child whereas maternity is established for a child irrespective of her status of legitimacy. An illegitimate child and her father have no corresponding rights and duties. The rules of Islamic law regarding establishment of paternity are very lenient and Pakistani law follows these rules to a large extent. According to article 227 of the Constitution of Pakistan 1973 Islamic law is a main source for Pakistani law. The article aims to discuss the concept and the rules regarding parentage in Islamic law and Pakistani law and analyses similarities and differences between the two systems. Important cases are discussed to consider the approach of the courts in deciding issues regarding parentage. The article deals with the *sunni*<sup>1</sup> view due to it being the law that the majority of Pakistani Muslims follow.

**Key words:** Islamic law; Pakistani law; Parentage; Legitimacy; Paternity

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<sup>1</sup> Four sunni schools discussed in this work are Hanafis, Mālikis, Shāf'is and Hanbalis which are named after their founders respectively Abu Hanīfah (d. 767 C. E.), Mālik ibn Anas (d. 801 C. E.), Muhammad ibn Idrīs Al-Shāf'ī (d. 820 C. E.) and Ahmad ibn Hanbal (d. 855 C. E.). Efforts have been made to use sources from all schools in writing this paper.

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## INTRODUCTION

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In Islamic law parentage or *nasab* means lineage. It refers to the ability of a child to be considered a part of a family group within a tribe. Nasab relates to referring to the father's name so that the lineage of the child can be identified. A major concern in determining parentage is that the child is legitimate. The protection of nasab is one of the five objectives of Islamic law.<sup>2</sup> Nasab is the most important right of a child as other rights such as inheritance, maintenance and guardianship depend on her<sup>3</sup> nasab which determines the status of legitimacy. Legitimacy is established for a child if she is born during a valid or irregular marriage (but not in a void marriage), or by acknowledgement by the father. A regular or valid marriage is a marriage having fulfilled all the necessary conditions. Irregular marriage is a marriage that suffers from a temporary bar. It is defined as good in its foundation (*asl*) but unlawful in its attributes. Irregular marriage has no legal effects till consummation. Examples of irregular marriages are: marriage with a woman in her waiting period<sup>4</sup> after dissolution of her first marriage, contracting marriage with a fifth wife when one of the four wives is in the waiting period, marriage without witnesses, having two sisters in wedlock. A void marriage is a marriage which suffers from a permanent bar and has no legal effect. Parentage gives rise to two rights: maternity and paternity. The rules regarding maternity are same irrespective of the child's status of legitimacy whereas paternity is only established for a legitimate child. Maternity is established via the biological mother of the child, whether the child was born in or out of wedlock. Paternity is established on legitimacy and other rights of a child are established on the basis of paternity. In Islamic law the status of legitimacy is very important with respect to the rights of the child.<sup>5</sup>

According to article 227 of the Constitution of Pakistan 1973 Islamic law is a main source for Pakistani law. Pakistani family law is generally based on Islamic law and custom. Pakistani law follows Islamic law in matters relating to parentage, so paternity is based on legitimacy.<sup>6</sup> A legitimate child is associated to the father whereas an illegitimate child is only associated to the mother. In Pakistani law a minor's rights of maintenance, custody and guardianship are based on her status of legitimacy. A legitimate child has these rights upon both parents whereas illegitimate child has these rights upon her mother only. Such a child cannot claim inheritance or maintenance from the father she will inherit from the mother and the maternal relatives. The father of such a child cannot have custody or guardianship, the mother or in her absence the maternal relatives will be given her custody and guardianship.

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<sup>2</sup> There are five objectives of Islamic law: preservation of religion, preservation of life, preservation of progeny/family, preservation of intellect, preservation of property. Parentage is included in preservation of progeny/family.

<sup>3</sup> The reference to the child as 'her' should be taken to include a male child as well and so to apply to children generally of both sexes unless it is specifically indicated to be gender specific.

<sup>4</sup> A Muslim woman is supposed to observe waiting period of three menstrual cycles in case of divorce and four months and ten days in case of death of her husband. If she is pregnant at the time of the dissolution of her marriage, her waiting period extends till delivery of the child. She is not allowed to remarry during this period.

<sup>5</sup> Nāsir, *Supra* note 6, at 156.

<sup>6</sup> The Qanun-e-Shahadat Order, 1984, Section 128.

According to Islamic law a child from a valid or irregular marriage is associated to the father. Paternity is also established if sexual relations take place between a couple who are not married to each other under a semblance of the right to marital intercourse. The term 'semblance of the right to marital intercourse' means a situation in which sexual intercourse takes place between a man and a woman under a belief that they are validly married to each other. The condition for establishment of paternity in such a case is that the father acknowledges the child and declares that it is not a child of adultery.<sup>7</sup> A child of adultery is not given the status of legitimacy even if the mother claims that the child is fathered by a particular person.<sup>8</sup> This is based on a hadith (prophetic report) in which the Prophet (Peace be upon him) said: "The child belongs to the bed, and to the adulterer belong stones." According to Pakistani courts a valid marriage, an irregular marriage and sexual intercourse as a result of the semblance of marriage are considered legal proofs of paternity<sup>9</sup> which is in line with Islamic law. This should be noted that like Islamic law in Pakistani law as well establishment of legitimacy or paternity has no effect on establishment of maternity. For a child, whether legitimate or illegitimate, maternity is always established (Mannan, 1995). In *Roshni Desai v. Jahanzeb Niazi and others* the Lahore High Court decided that an illegitimate child only belongs to the mother. Maternity is established for a child regardless of the child's status of legitimacy. In this case a child was born to a Hindu mother and a Muslim father not married to each other. The court declared the child illegitimate and gave its custody to the mother stating that such child has no relation with the father so rights of inheritance, maintenance and guardianship between the child and the father do not exist. An illegitimate child will only inherit from her mother and custody of the child can be given to the mother and maternal relatives.<sup>10</sup> Denial of paternity of an illegitimate child is considered a punishment for the adulterous father as he is not given paternity rights over the child. To deprive the father of paternity rights in the case of an illegitimate child is a punishment, as children, whether legitimate or illegitimate, were thought of as wealth in Arab society. Islam requires this wealth to be deprived if the child is illegitimate. This is based on the principle that one should not benefit from wrongdoing. Maternity is acknowledged in the case of an illegitimate child probably because the mother is needed to look after the child and to fulfill her needs (Hammudah, 1970; Lynn, 2007). From the perspective of the rights of the child it is harmful for that child who has no right to maintenance, inheritance and guardianship on her father. In Muslim societies where most women are not financially independent, it could be really hard for such a child to survive. Also, both the father and the mother are equally responsible for adultery so they should both share responsibility. In today's world children are more a responsibility than a form of wealth. In a case the Federal Shariat Court of Pakistan while defending an illegitimate child's right to claim maintenance from

<sup>7</sup> Näsir, *Supra* note 6, at 161.

<sup>8</sup> Zuhaili, *Supra* note 2, Vol. 10, at 7256, 7262.

<sup>9</sup> *Shamsul Shamsul Haq v Mst. Nazima Shaheen and another*, P Cr.LJ 1026 FSC (1992). Also see *Taza Gul v Bibi Aisha*, PLD Peshawar 17 (1951); *Bashir Ahmed and another v the State*, PCr.LJ 352 (1984); *Muhammad Sidique v the State*, PLD SC 1079 (1990); *Muhammad Sarwar and Mst. Sahib Khatoon v the State*, PCr.LJ note 69 at p. 49 (1991).

<sup>10</sup> PLD Lahore 423 (2011).

the biological father said that to make the father obliged to pay maintenance does not vest paternity rights in him it only makes him responsible for his actions. The court considered it unfair to make the mother responsible for all needs of the child and not the father.<sup>11</sup> The Federal Shariat Court seems to take the duty to maintain an illegitimate child as a punishment for the father. According to this interpretation such father does not have any rights on the child but should have responsibilities. This approach is against traditional Islam and is not followed in Pakistan by other courts.

In Islamic law legitimacy of a child is established by a valid or irregular marriage provided the husband is major (i.e., has completed puberty) and the couple had intercourse or was in valid retirement ("khalwah sahihah").<sup>12</sup> Legitimacy of a child can be established by acknowledgement and evidence as well. Following is the discussion about the rules regarding establishment of legitimacy.

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## 1. LEGITIMACY BY BIRTH

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Because of the importance of the status of legitimacy Muslim jurists tend to be very lenient in this respect. The important issue in establishment of legitimacy is the minimum and maximum period of gestation. Muslim jurists agree that the minimum period of gestation is six months (Zain-al-Dīn & Al-Bahr-al-Rā'iq, 1997; Mansūr & Kashāf-al-Qanā', 1997; Abī & Rowdhah-al-Tālibīn, 2000); Umar & Ahkām-al-Janīn (2001). According to the majority of jurists (Hanbalis, Shāf'is and Mālikis) the term of pregnancy should be counted from the time of the possibility of consummation. The possibility of consummation implies that the husband is of age and has access to the wife. According to Abū Hanīfah the term of pregnancy should be counted from the date of the marriage contract. As far as an irregular marriage is concerned all jurists including the Hanafis agree that in an irregular marriage the pregnancy period shall be counted from consummation and not from the date of the contract.<sup>13</sup> The minimum period of gestation in an irregular marriage is the same as in a valid marriage i.e., six months, whereas the maximum period is nine months during the subsistence of marriage as well as after separation.<sup>14</sup> In Pakistan section 128 of the Qanun-e-Shahadat Order 1984 provides that the minimum period of pregnancy is six months. A child born after six months from the date of marriage is legitimate provided the father does not deny paternity. This provision

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<sup>11</sup> The case is unreported. SSM 14/S/1984 mentioned in Patel (1986).

<sup>12</sup> Khalwah Sahihah (valid retirement) means that the couple had been alone for a while and they had the chance to consummate the marriage. In the case of valid retirement it is presumed that the marriage is consummated. There are certain conditions to render the retirement valid for instance there should not be any natural or legal impediment to sexual intercourse. There should be no one present with the couple who is old enough to understand sexual relations and whose presence will hinder consummation of marriage; the couple should not be on pilgrimage or offering obligatory worship. But if there is a question regarding legitimacy of a child a retirement is considered valid, irrespective of the fulfillment of these conditions. For a detailed discussion see Siddiqui (1995).

<sup>13</sup> Muhammad (1973); Ibn 'Ābidīn, *Supra* note 4, Vol. 8, at 451; 'Alī Al-Khatīb, *Fiqh al-Tifl: Dirāsah Muqāranah fī Daw' al-Madhāhib Fiqhiyah al-Sab'ah*: Al-Imāmiyah, Al-Zaidiyah, Al-Hanafiyah, Al-Shāf'iyah, Al-Mālikiyah, Al-Hanbaliyah, Al-Ibādiyah 132 (Beirut: Mu'ssasah Al-'Ārif lil Matbu'āt, 2002); Zuhaili, *Supra* note 2, Vol. 10, 7250.

<sup>14</sup> Nāsir, *Supra* note 6, 161.

is based on Islamic law. An important case regarding the minimum period of pregnancy is *Hamida Begum v. Murad Begum*. In this case the Supreme Court of Pakistan declared that a child born within six months of the marriage is legitimate if acknowledged by the husband.<sup>15</sup> This is actually a deviation from the rules of Islamic law as in Islamic law a child born after six months and not within six months is legitimate. This case shows approach of Pakistani courts that in deciding cases of legitimacy the courts don't emphasize technicalities rather they keep in view the social stigma attached to illegitimacy and are very reluctant to declare a child illegitimate (David & Werner, 1998).

In Islamic law the consensus on the minimum period of gestation is based on the following verses of the Qur'ān: "And we have enjoined on man goodness to his parents: his mother carried him in distress; and his gestation and weaning take thirty months."<sup>16</sup> and "We have entrusted man with the care of his parents: his mother bore him, sapped and weakened, and his weaning takes two years: so be grateful to Me, and to your parents".<sup>17</sup> The first verse states that the period for pregnancy and weaning is thirty months and the second verse tells that the time period for weaning is two years. By subtraction of two years from thirty months it seems that the period of pregnancy is six months.<sup>18</sup> If the time period from the marriage till birth of the child is less than six months the child will not be considered legitimate.<sup>19</sup> If a child is born after six months from the date of marriage she will be considered legitimate unless the father disowns paternity.<sup>20</sup> According to all schools of Islamic law paternity in a valid marriage can only be denied by the process of imprecation (li'ān).<sup>21</sup> According to Abū Hanīfah a child of an irregular marriage cannot be disowned by the father on the basis of imprecation as imprecation is possible only in a valid marriage.<sup>22</sup> In imprecation the husband disowns paternity of the child born by his wife by swearing four times that the child is not his child. He then calls upon himself the curse of Allah if he has sworn falsely. After that the wife, if she denies adultery, swears four oaths and invokes upon herself the curse of Allah if she is guilty.<sup>23</sup> The oaths should be taken in front of a court which as a result annuls the marriage. This annulment is irrevocable. There are two legal effects of imprecation: permanent separation between the couple and denial of paternity of

<sup>15</sup> PLD SC 624 (1975).

<sup>16</sup> Q46:15. The English translation of the Qur'ān used for this work is by Thomas & Qur'ān (2004).

<sup>17</sup> Q31:14.

<sup>18</sup> Burhān-al-Dīn (1975); Ibn Nujaim, *Supra* note 18, Vol. 4, at 272; Nāsir, *Supra* note 6, at 157; Shaikh etc. (1982).

<sup>19</sup> Ibn Nujaim, *Supra* note 18, Vol. 4, at 262.

<sup>20</sup> Esposito, *Supra* note 6, at 28.

<sup>21</sup> Zuhaili, *Supra* note 2, Vol. 10, at 7249; Abū Muhammad 'Alī ibn Ahmad ibn Sa'īd ibn Hazm, *Al-Muhallā bil Athār*, Vol. 9, 337 ('Abdul Ghaffār Sulaimān Al-Bindārī ed, Dār al-Kutb Al-'Ilmiyah, 1984); Nāsir, *Supra* note 6, at 161.

<sup>22</sup> Nāsir, *Supra* note 6, at 161.

<sup>23</sup> 'Abdullah ibn Ahmad ibn Qudāmah, *Al-Mughnī wa Al-Sharh Al-Kabīr 'alā Matn Al-Muqni'*, Vol. 9, 4-5 (Beirut: Dār-al-Fikr, 1984); Ibn Hazm, *Supra* note 28, Vol. 9, at 331-332; Abī Al-Walid Muhammad ibn Ahmad ibn Muhammad ibn Ahmad ibn Rushd, *Bidāyat-al-Mujtahid wa Nehāyat-al-Muqtasid*, Vol. 3, 1146-1147 (Beirut: Dār Ibn Hazm, 1995); Ibn Nujaim, *Supra* note 18, Vol. 4, at 188-195; Abī Al-'Abbās Ahmad ibn Hamzah ibn Shahāb-al-Dīn al-Ramlī, *Nihāyat-al-Muhtāj ilā Sharh-al-Minhāj*, vol. 7, 113-115 (Beirut: Dār-al-Fikr, 2004); Muhammad ibn Idrīs Al-Shāfi', *Kitāb-al-Umm*, Vol. 6, 727-734 (Al-Mansūrah: Dār-al-Wafā lil-Tibā'ah wa al-Nashr wa al-Tawzī', 2005).



the child.<sup>24</sup> The conditions for valid imprecation are that the marriage is valid and the husband must not have claimed paternity of the child earlier. If he has claimed paternity of the child earlier he cannot deny it. In the case of a valid imprecation the child and the husband of the mother will not have any mutual rights but the prohibited degrees of relationship will still apply towards each other.<sup>25</sup> A father who has once disowned his child by imprecation cannot claim paternity later according to the majority of jurists, although the Shāf'is are of the view that such a child can be acknowledged by the father after imprecation.<sup>26</sup> By the process of imprecation a husband, when he accuses his wife of adultery, will not be punished for qadhf (false accusation of adultery) even if he has no witnesses to prove the accusation.<sup>27</sup> It is an exception to the rule that anyone who accuses a person of adultery and cannot prove it with four witnesses is punished for false accusation of adultery.<sup>28</sup>

In Pakistani law a child may be disowned by imprecation. The doctrine of imprecation is embodied in section 14 of the Offence of Qadhf (Enforcement of Hudood) Ordinance 1979. According to this section a husband who accuses his wife of adultery has to say upon oath in front of the court: 'I swear by Allah the Almighty and I am surely truthful in my accusation of unlawful sexual intercourse against my wife'. After swearing four times he shall say: "Allah's curse be upon me if I am a liar in my accusation of unlawful sexual intercourse against my wife." The wife shall swear in the court four times and say: "I swear by Allah the Almighty that my husband is surely a liar in his accusation of unlawful sexual intercourse against me" and the fourth time she shall say: "Allah's wrath be upon me if he is truthful in his accusation of unlawful sexual intercourse against me". After the completion of this procedure, the court dissolves the marriage, and no appeal against the dissolution is allowed. If the husband or the wife refuses to swear they shall be imprisoned until they agree to swear. If the wife accepts the husband's accusation she shall be punished for adultery.<sup>29</sup> This law is in line with Islamic law. As in Islamic law, the dissolution of a marriage by imprecation is final and irrevocable Pakistani law incorporates this provision by not allowing any appeal against such dissolution. Pakistani courts apply the process of imprecation in cases of denial of paternity. In *Punhoon Lashari v the State* the Karachi High Court said that in the case of accusation of adultery by the husband against the wife, imprecation is a procedure ordained by Islamic law. In such a case the husband has no right to punish his wife: he is ordered to leave her with kindness if the couple cannot live within the limits prescribed by Shari'ah.<sup>30</sup> It is evident from case law that Pakistani courts are reluctant to declare any child illegitimate. The procedure of imprecation is invoked as a last resort. In *Muhammad Riaz v. Asia Perveen* where the father denied paternity to avoid liability of maintenance, the court accepted a medical report presented by the mother and a report of the chairman of the Union

<sup>24</sup> Al-Ramli, *Supra* note 30, Vol. 7, at 115; Al-Shāf'i, *Supra* note 30, Vol. 6, at 733-734.

<sup>25</sup> Nāsir, *Supra* note 6, at 159.

<sup>26</sup> Al-Ramli, *Supra* note 30, Vol. 7, at 125; M. S. Sujimon, *Istilhaq and Its Role in Islamic Law*, 18 (2) ALQ 125, 134 (2003).

<sup>27</sup> Ibn Nujaim, *Supra* note 18, Vol. 4, at 188-195; Al-Buhūti, *Supra* note 18, Vol. 5, at 468-469.

<sup>28</sup> Al-Ramli, *Supra* note 30, Vol. 7, at 103.

<sup>29</sup> The Offence of Qadhf (Enforcement of Hudood) Ordinance 1979, Section 14.

<sup>30</sup> PCr.LJ Karachi 926 (2001).

committee where divorce proceedings were conducted. The child was conceived and delivered during the marriage, so was considered legitimate.<sup>31</sup> In this case the court followed the principle of 'the conjugal bed' and paternity was not denied. This principle will be discussed latter.

In Islamic law there is considerable difference of opinion among the jurists as to the maximum period of gestation. According to Abū Hanīfah the maximum period is two years.<sup>32</sup> He based his opinion on a prophetic report narrated by 'Āishah that the Prophet said, "the child doesn't stay in the womb of the mother more than two years". According to the Shāf'ī and Hanbalī jurists the maximum period of pregnancy is four years. If the child is born after four years from the date of divorce and the wife has declared that her waiting period is not over and she has not remarried, the child will be attributed to her father. According to the Mālikīs the maximum period of pregnancy is five years whereas according to the Zāhirīs the maximum term of pregnancy is nine months.<sup>33</sup> The jurists who recognize longer than normal periods of gestation based their opinions on the birth of Ibn Rabī'a, Ibn 'Ajlan and Zuhāk Tāzi who were reported to be born during the fourth year of pregnancy. The second report on which these opinions are based is that the women from tribe Banī 'Jlan remained pregnant for four years.<sup>34</sup> The Mālikī opinion which provides for the longest period of gestation is based on the doctrine of the "sleeping foetus". Ziba Mir-Hosseini elaborates this doctrine as "an embryo for some unknown reasons goes to sleep in the mother's womb, and remains there dormant for some time until it is awakened, for example by a magical potion or through the intervention of a saint" (Ziba, 2000). According to a tradition, Mālik himself was born more than three years after the demise of his father. This theory of the "sleeping foetus" is challenged by modern scholars who consider it against the biological facts.<sup>35</sup> In medical opinion the period of gestation is nine months. Ibn Sīnā' was of the opinion that the minimum period of pregnancy is seven months and the maximum is ten months (Abū, n.o.). Modern medical science says that the period of gestation is 260-294 days which is 37 to 42 weeks<sup>36</sup> but due to some factors pregnancy can be prolonged. Those pregnancies which terminate after 43 weeks are termed as prolonged pregnancies (Michael, 1967). In medical history there have been cases in which this period went to 330, 342 or 389 days. There is consensus of opinion among Muslim jurists that *fatwa* (a legal opinion) cannot be given on the basis of medical facts. Although two or four years period of gestation is an exceptional case Muslim jurists in the past considered these situations possible, so that no child would be stigmatized as illegitimate just because of a longer period of gestation (Tanzil-al-Rehmān, 1978). Shaham gives two reasons for the lenient attitude of Islamic law towards paternity: welfare of the child, as the child's other rights including inheritance, maintenance and guardianship depend on her status of legitimacy; and to reduce the number of persons accused of adultery, probably

<sup>31</sup> MLD Lahore 142 (1997).

<sup>32</sup> Ibn Nujaim, *Supra* note 18, Vol. 4, at 264; Ibn 'Ābidīn, *Supra* note 5, Vol. 8, at 450-451.

<sup>33</sup> Ibn Hazm, *Supra* note 28, Vol. 9, at 131-132; Al-Buhūti, *Supra* note 18, Vol. 5, at 473-474; Ibn 'Ābidīn, *Supra* note 5, Vol. 10, at 378-382.

<sup>34</sup> Ibn 'Ābidīn, *Supra* note 5, Vol. 10, at 378-379; Zuhaili, *Supra* note 2, at 7251; Syed (1917).

<sup>35</sup> *Id.*, 143-146.

<sup>36</sup> Ambreen Akhtar and Waseem Tālib, *Pregnancy*, 18(1). THE PROF. MED. J. 5 (2011).

because of the harsh punishment for the offence and the stigma attached to it (Ron, 2010).

In Pakistani law section 128 of the Qanun-e-Shahadat Order 1984 provides that a child born during a valid marriage, if not born before expiry of six lunar months from the date of marriage, or within two years after its dissolution, and whose mother has remained unmarried, shall be considered legitimate. Legitimacy will not be established if the husband refuses to accept the child, or, the child was born after expiry of six lunar months from the date on which the woman had accepted that her waiting period has expired. The important points of this legislation are the determination of minimum and maximum periods of gestation. This section clearly states that a child born in a valid marriage will be considered legitimate. Section 128 of the Qanun-e-Shahadat Order 1984 replaced section 112 of the Evidence Act 1872. Section 112 of the Evidence Act 1872 provided that a child born during a valid marriage or within 280 days after dissolution of a marriage would be legitimate, except where it is proved that the husband and the wife had no access to each other. This law was contrary to Islamic law, as a minimum and maximum period of gestation was not given. This section did not affect the rules related to acknowledgement of paternity.<sup>37</sup> In section 128 of the Qanun-e-Shahadat Order 1984 this gap was filled and the legislators tried to cover all important points of Islamic law relating to legitimacy. According to section 112 of the Evidence Act a child born one day after the marriage would be legitimate as a minimum period of pregnancy was not fixed in this section and a child born 290 days after the dissolution of marriage would be illegitimate as in the case of dissolution the period was fixed at 280 days.<sup>38</sup> This was totally un-Islamic. In Islam the time of conception and not the time of birth is important for legitimacy. This point of Islamic law was neglected while framing section 112. The section 128 of the Qanun-e-Shahadat Order 1984 is in accordance with Hanafi law in which the maximum period is fixed at two years, based on a hadith reported by 'Āishah.<sup>39</sup>

Section 128 of the Qanun-e-Shahadat Order 1984 is in accordance with Islamic law except that in this section no distinction is made between valid and irregular marriages. In Hanafī law there is a distinction between these two. Although paternity is established in both cases, the rules with respect to regular and irregular marriages are different. For example in a regular marriage a husband may disown his child by imprecation but in the case of an irregular marriage he cannot. In an irregular marriage the husband and the wife have no rights of inheritance; there is no right to maintenance for the wife although she is entitled to dower (mahr). Although this gap in the legislation is filled by the courts and Pakistani courts consider children born of an irregular marriage legitimate,<sup>40</sup> it is recommended that children born out of irregular marriage should be recognized as legitimate by the law.

As said earlier according to Pakistani courts a valid marriage, an irregular marriage and sexual intercourse as a result of the semblance of marriage are

<sup>37</sup> Pearl and Menski, *Supra* note 22, at 404.

<sup>38</sup> Rehman, *Supra* note 47, Vol. 1, at 698-700.

<sup>39</sup> *Id.*

<sup>40</sup> Shamsul, *Supra* note 12; Muhammad Miskin v. Nasim Akhtar, CLC 558 (1979); Allahdad v. Mukhtar, SCMR 1273 (1992).



considered legal proofs of paternity<sup>41</sup> which is in line with Islamic law. A child born during a marriage or less than two years after its dissolution is legitimate provided the mother has not remarried during this period. This is considered a conclusive proof of legitimacy if it is not denied by the father.<sup>42</sup> In the case of a valid marriage the child follows the status of the father without any acknowledgement of paternity.<sup>43</sup> Pakistani courts are of the opinion that a child born of a marriage subsequently declared void is legitimate, provided the parties believed in good faith that there was no impediment to their marriage. If at a later stage it is found that there was such an impediment, the marriage will be considered null and void but the children born of such a marriage will be legitimate.<sup>44</sup>

Pakistani courts are very lenient in application of the rules of legitimacy to avoid the stigma of illegitimacy. They follow Hanafi interpretation in deciding issues of legitimacy and occasionally deviate from Islamic law to hold a child legitimate. Pakistani law and courts aim to protect the child and the mother from the stigma of illegitimacy by showing flexibility regarding the rules of legitimacy.

## 2. THE “CONJUGAL BED” (AL-WALAD LIL FIRASH) PRINCIPLE

According to a report the Prophet said “The child belongs to the bed (firāsh), and to the adulterer belong stones”.<sup>45</sup> There is a difference of opinion among Muslim jurists as to the meaning of the “conjugal bed” (firāsh). According to the majority of jurists the “conjugal bed” refers to the woman who gives birth to the child in a valid marriage. According to another opinion it refers to the subsistence of a valid marriage at the time of conception of the child.<sup>46</sup> The principle of the conjugal bed is established in valid and irregular marriage and also in semblance (shubha) of the contract of marriage (Abi Ishāque, 1997). This principle gives rise to a presumption of legitimacy that the child belongs to the husband of the mother and there is no need for acknowledgement or evidence of paternity if the existence of the conjugal bed is proved.<sup>47</sup>

In Islamic law there are four conditions for applicability of the principle of the conjugal bed. The first condition is that there should be a possibility of pregnancy from the husband. So, for instance, if the husband is a minor the principle does not apply. The second condition is the possibility of sexual relations between the couple. This is the opinion of the majority of jurists: Abū Hanīfah, however, is of the opinion that the conjugal bed is proved by the existence of the marriage contract.<sup>48</sup> He does not consider ‘possibility of sexual relations between the couple’ a

<sup>41</sup> Shamsul, *Supra* note 12; Also see *Taza Gul v Bibi Aisha*, PLD Peshawar 17 (1951); *Bashir Ahmed and another v the State*, PCr.LJ 352 (1984); *Muhammad Sidique v the State*, PLD SC 1079 (1990); *Muhammad Sarwar and Mst. Sahib Khatoon v the State*, PCr.LJ note 69 at p. 49 (1991).

<sup>42</sup> *Khizar Hayat v. Additional District Judge, Kabirwala*, PLD Lahore 422 (2010).

<sup>43</sup> *Hamida*, *Supra* note 21; *Abdul Rashid v Safia Bibi*, PLD FSC 10 (1986); *Muhammad Talat v. Mst. Yasmin Zohra and another*, CLC Lahore 1180 (1992).

<sup>44</sup> *Lt-Col. Muhammad Yusuf, Commissioner Quetta Division v. Syed Ali Nawaz Gardezi*, PLD Lahore 141 (1963).

<sup>45</sup> Al-Qashīrī, *Supra* note 11, at 924.

<sup>46</sup> Shalabī, *Supra* note 19, at 683; Zuhailī, *Supra* note 2, at 7249-7250.

<sup>47</sup> Al-Khatīb, *Supra* note 19, at 131.

<sup>48</sup> Shalabī, *Supra* note 19, at 684-686; Zuhailī, *Supra* note 2, at 7249-7250.

condition. The third condition is that the child should be born after six months from the date of the marriage contract according to the Hanafis and from the possibility of consummation according to the other three schools. As discussed earlier, the minimum period of gestation is six months: if a child is born before six months from the date of marriage the conjugal bed principle does not apply and the child is considered a child of unlawful sexual intercourse (*zinā*). The fourth condition is that the child should be born within the maximum time limit from the date of divorce or death of the husband. According to Abū Hanīfah, this principle applies to a birth taking place less than two years after the dissolution of a marriage and according to the Mālikīs and Shāf'īs within four years. The time of conception and not the time of birth is important in this case.<sup>49</sup>

According to Islamic law, if a woman, who is unmarried, gives birth to a child, her child will be considered a child of unlawful sexual intercourse (*zinā*). For a married mother the child belongs to her husband. It is a condition for acceptance of acknowledgement of paternity that there should be no dispute over paternity and the paternity of the child should be unknown. If there is a dispute over paternity the conjugal bed principle shall apply and the husband of the mother will be considered to be the child's father. The only way to deny paternity by the conjugal bed is by imprecation.<sup>50</sup> After imprecation the wife will no longer be the conjugal bed.<sup>51</sup> The conjugal bed is a conclusive proof of legitimacy. Other proofs like acknowledgement by the father and DNA tests will be resorted to if the conjugal bed is not proved.

Pakistani courts recognize the principle of the conjugal bed and it is considered a conclusive proof unless evidence to the contrary is produced. A husband may rebut the presumption of legitimacy of a child born during marriage and prove lack of access. Pakistani courts consider the custom of the area where the father resides very important in this respect. The father must disown the child at the time of the birth or at the time of making preparations for the arrival of the child or, if he is absent, when he comes to know about the birth.<sup>52</sup> The time of denial of paternity is very important and delay in such cases is not accepted. In *Khizar Hayat v. Additional District Judge, Kabirwala* the Lahore High Court considered the knowledge of birth by the father and the entry of child's name in the family tree by a local administrator, who was responsible for recording births, to be proof of legitimacy. The court said that a birth certificate, being a public document, is acceptable as proof and a presumption of truth is attached to it.<sup>53</sup> It is presumed that if the child is illegitimate the husband of the mother will deny paternity when he becomes aware of the pregnancy or at the time of birth. Delay in such cases means that at first the father accepted the child as his own. In this case there might be a presumption of acknowledgment of legitimacy/paternity, and paternity cannot be denied once acknowledged unless there is evidence to the contrary. Pakistani courts apply the principle of the conjugal bed even when conditions of its applicability are not fulfilled. In *Hamida Begum v. Murad Begum* the Supreme Court of Pakistan

<sup>49</sup> Shalabi, *Supra* note 19, at 684-686.

<sup>50</sup> *Id.*, 688.

<sup>51</sup> Al-Shāf'ī, *Supra* note 30, Vol. 6, at 733.

<sup>52</sup> *Hamida Supra* note 21; *Shah Nawaz v Nawaz Khan*, PLD SC 767 (1976).

<sup>53</sup> *Khizar, Supra* note 54.

applied this principle to a child born within six months of the marriage and held the child to be legitimate.<sup>54</sup> The purpose of this approach is to protect the child and the mother from the stigma of illegitimacy.

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### 3. LEGITIMACY BY ACKNOWLEDGEMENT

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In Islamic law, legitimacy can be established by acknowledgement. Acknowledgement of paternity is acceptable even if it takes place on a person's death bed.<sup>55</sup> There are four conditions laid down by jurists for an acknowledgement to be accepted.

(i) The paternity of the child should be unknown. If the child's paternity is known it cannot be changed by acknowledgement as in that case the issue will be decided on the basis of evidence (Asaf, 1955).<sup>56</sup>

(ii) It must be possible for the acknowledged person to be the child of the acknowledger. For example, the minimum age of puberty for a boy is twelve years and the minimum period of gestation is six months: so the child must be twelve years and six months younger than the acknowledger. If the mother is acknowledging the child she must be nine years and six months older than the child, as the minimum age of puberty in her case is nine years.<sup>57</sup>

(iii) If the child has attained puberty he/she must support the acknowledgement. Puberty is a condition according to the majority of jurists, but attaining the age of discretion (which is seven years) is a condition according to the Hanafis. According to the Hanafis if the child is above seven years the judge can decide whether she is mature enough to make a statement or not. If the child is under age or insane, her acceptance is not necessary: if the child is a major and does not support the acknowledgement evidence will be needed to prove paternity. The Mālikis differ from the majority of jurists and do not require acceptance of the child as a condition.<sup>58</sup>

(iv) No other person should have claimed paternity of the child. If two persons claim paternity of the same child, paternity will not be established because the statements of acknowledgement clash with each other. In that case paternity will be established on the basis of evidence. If a man claims paternity on the basis that the child is his child from unlawful sexual intercourse, paternity will not be established. Such a claim or acknowledgement is void. A valid acknowledgement is not only of biological paternity but also of legitimacy.<sup>59</sup>

The above-mentioned conditions are agreed upon by Muslim scholars. There are some additional conditions laid by some schools. According to the Hanafis the child, whose paternity is going to be established, must be alive.<sup>60</sup> If the child is dead acknowledgement will not establish paternity posthumously. But if the acknowledged person has children this limitation does not apply as

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<sup>54</sup> *Supra* note 21.

<sup>55</sup> Zuhaili, *Supra* note 2, Vol. 10, at 7265.

<sup>56</sup> Shalabi, *Supra* note 19, at 695; Asaf (1955).

<sup>57</sup> Shalabi, *Supra* note 19, at 696-698; David (1987).

<sup>58</sup> Zuhaili, *Supra* note 2, Vol. 10, at 7266-7267; Al-Khatib, *Supra* note 19, at 133-134.

<sup>59</sup> *Id.*; Ibn Muflih, *Supra* note 59, Vol. 7, at 70.

<sup>60</sup> Ibn Qudāmah, *Supra* note 30, Vol. 5, at 334.

the establishment of the paternity of their father will be in their interests. Here the Mālikīs differ from the Hanafīs for, according to the former paternity can be established for a dead person. The Mālikī opinion is more logical, as even when a child is dead her identity is important for the family and the name of the father is a part of the identity. An acknowledged person is considered a natural child of the acknowledger and acknowledgement gives rise to all legal effects of a natural relationship between the parent and the child (Robert, 1925), but it does not give rise to a presumption of marriage between the mother and the father of the child. This is according to the majority of jurists (Dawood, 1996). The Hanafī school disagrees and according to them establishment of paternity does give rise to the presumption of marriage.<sup>61</sup>

According to the majority of jurists (except the Hanafīs) only the biological father of a child may acknowledge paternity. If the acknowledgement is made by a person related to the child but not his father, according to Abū Hanīfah it is only acceptable if confirmed by the father or in the case of his death or absence, by two heirs in the family.<sup>62</sup> Ibn Hanbal however considers the grandfather to be capable of acknowledgement if the father is dead.<sup>63</sup> An acknowledgement of paternity will be considered true if it fulfills all the above mentioned conditions, unless it is proved false by evidence. Retraction of acknowledgement of paternity is not acceptable.<sup>64</sup>

In Pakistan the law is silent about acknowledgement of paternity, but according to case law, legitimacy of a child may be presumed in the following cases: where there has been continuous cohabitation of the alleged parents and where the father acknowledges the child. This acknowledgement can be expressed or implied. The acknowledgement should not only be of biological paternity but of legitimate paternity. If the husband and the wife cohabit and treat that child as their own, this amounts to acknowledgement of the child.<sup>65</sup> Pakistani courts consider the conduct of the father very important in this respect: if he admits the relationship is not adulterous and treats the minor as his child this will amount to acknowledgement of paternity.<sup>66</sup> If the parents are separated but not divorced and there is no proof of lack of access, a child born during that period is considered legitimate.<sup>67</sup> The courts are of the view that direct proof of legitimacy is not needed as it can be inferred from circumstances.<sup>68</sup> If there is no direct proof of marriage the status of legitimacy will be presumed from acknowledgment or treatment of the child by the father.<sup>69</sup> The presumption of legitimacy is a presumption of fact which is rebuttable by contrary evidence.<sup>70</sup> According to case law, acknowledgement is an acceptable

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<sup>61</sup> Ibn Qudāmah, *Supra* note 30, Vol. 5, at 335.

<sup>62</sup> Zuhailī, *Supra* note 2, Vol. 10, at 7267-7268.

<sup>63</sup> Sujimon, *Supra* note 33, at 129.

<sup>64</sup> Ibn Qudāmah, *Supra* note 30, Vol. 5, at 334-335.

<sup>65</sup> Malik Jiand Khan v Province of Sindh, MLD Karachi 2128 (1986); Ghulam Muhammad v. Muhammad Hussain, PLD Lahore 478 (1978); Habibullah v. Sakhi Muhammad, PLD Lahore 128 (1986); Bashir v. Ilam Din, PLD SC 8 (1988).

<sup>66</sup> Sher Afzal v. Shamin Firdaus, PLD SC 228 (1980).

<sup>67</sup> Asadullah Khan v. Abdul Hamid, PLD BJ 1 (1967).

<sup>68</sup> Munir Ahmad v Muhammad Saddique, MLD Lahore 364 (2005).

<sup>69</sup> Bibi Amu v. Mst. Asiat and others, PLD Karachi 420 (1958).

<sup>70</sup> Malik, *Supra* note 80.

way of establishing paternity. In absence of any other direct proof paternity can be acknowledged but the courts require it to be in accordance with Islamic law. If an acknowledgement is against the principles of Islamic law it is not acceptable. As there is a presumption of legitimacy, the burden of proof is on the party challenging paternity.<sup>71</sup> In *Maj. (Retired) Abdul Akbar through Legal Heirs v. Mst. Maryam Khushmoo and 5 others* the Peshawar High Court said that if marriage between the parties is not proved by evidence Islamic law accepts acknowledgement of the father regarding his marriage and legitimacy of the child. The court said that the basic principle in the cases of legitimacy is that 'the child follows the bed.'<sup>72</sup> In *Syed Iftikhar Hussain Jafri v. Mrs. Shamshad Begum* the step brother of the deceased Syed Altaf Hussain claimed a share in inheritance and argued that his brother's only son was illegitimate. He argued that the marriage certificate and divorce deed produced to prove his deceased brother's marriage were fake. The marriage registrar was called and he produced the original marriage certificate from his record. The Karachi High Court also noticed that when the deceased was alive he and his wife had a dispute regarding custody of the child. Then they reached a compromise before the appellate court that the minor will live with the father. The court inferred from this compromise that the boy was the deceased's legitimate son.<sup>73</sup> Pakistani courts follow Islamic law regarding the acceptance of acknowledgement of paternity. But the law itself does not state conditions regarding acceptance of acknowledgement of paternity, which is a lacuna which needs to be filled.

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#### 4. LEGITIMACY BY EVIDENCE

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In Islamic law paternity can be established by witnesses or by furnishing any other evidence. Establishment of paternity by evidence is stronger than the establishment of paternity by acknowledgement. If evidence and acknowledgement contradict each other, evidence will be accepted and the decision will be made according to the evidence.<sup>74</sup>

Muslim jurists differ as to the number of witnesses required to prove paternity. According to Abū Hanīfah and Muhammad bin Hasan Al-Shaibānī paternity is established by the testimony of two male witnesses or one male and two female witnesses. According to the Mālikīs paternity can be established by two male witnesses only. Mālikīs do not accept the testimony of women regarding paternity. According to the Shāf'ī and Hanbalī schools paternity is established by testimony of all heirs. Abū Yūsuf also agrees with them.<sup>75</sup> If the dispute is about the birth or identity of a child the evidence of a single midwife (or nowadays a doctor) is enough according to the Hanafīs. The Shāf'īs ask for four women, whereas the Mālikīs accept the testimony of two women. If the dispute about the birth or identity of the child arises after separation between the couple all schools accept

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<sup>71</sup> Muhammad Hussain v. Sardar Khan, PLD Lahore 575 (1993).

<sup>72</sup> PLD Peshawar 78 (2011).

<sup>73</sup> PLD Karachi 232 (2011).

<sup>74</sup> Shalabī, *Supra* note 19, at 704.

<sup>75</sup> Zuhailī, *Supra* note 2, Vol. 10, at 7267-7268.



the evidence of two men or one man and two women. The Mālikīs are the only school which excludes women from giving evidence in the case of establishment of paternity. They accept the testimony of women in the case of a dispute over identity of the child but not over paternity, which is inconsistent. If the woman is capable of testifying there should not be discrimination between cases of paternity and identity of the child.

Physiognomy is a science in which an expert can trace lineage on the basis of the physical resemblance of a child to her parents. There is difference of opinion among Muslim jurists regarding the acceptability of physiognomy as evidence. Physiognomy is accepted by the Hanbalīs, the Mālikīs and the Shāf'īs as a proof of parentage. The Hanafīs do not accept it as valid evidence. According to them physical resemblance cannot be considered as evidence as it may be absent between parents and children and may be found between distant blood relatives. The majority base their opinion on a report by 'Āishah according to which the Prophet gave implicit approval to the use of physiognomy. A physiognomy expert, Mujazziz Al-Mudliji established the paternity of Zaid bin Hārithah for Usāma bin Zaid by looking at their feet, although Zaid had a fair complexion and Usāma was black like his African mother.<sup>76</sup> According to the majority of jurists physiognomy does not furnish conclusive proof and the doctrine of the conjugal bed supersedes physiognomy. It can be used only when legally conclusive proof of paternity is absent.<sup>77</sup> Ahmad bin Hanbal accepts physiognomy if two experts give the same opinion.<sup>78</sup> According to Ibn Ma'jūz, physiognomy is only circumstantial evidence.<sup>79</sup> If the paternity or maternity of a child or a foundling is in question and there are two or more claimants, according to the Hanbalīs, the Shāf'īs and the Mālikīs the case will be decided by a physiognomy expert. According to the Hanafīs, if there is no evidence then priority will be given according to the following: a Muslim shall be preferred over a non-Muslim and a free person shall be preferred over a slave.<sup>80</sup> Physiognomy should not be taken as conclusive proof as paternity cannot be established on the basis of resemblance. According to the Hanafīs the case of Usāma was not a case of determination of paternity as his paternity was already known. Pakistani law is silent on the issue of physiognomy and Pakistani courts do not resort to physiognomy in disputes over paternity. This approach is in accordance with the Hanafi view.

With the introduction of DNA tests it is not difficult to prove or disprove paternity. Muslim scholars are of the opinion that a DNA test is an acceptable proof provided it is conducted with caution and by reliable people. Muslim scholars consider it a circumstantial evidence and not a conclusive proof as it is prone to error. The principle of conjugal bed supersedes all other evidences. Muslim scholars are of the view that Shar'ī texts and principles should be given priority and such scientific techniques should be treated as circumstantial evidence which should

<sup>76</sup> Ibn Qudāmah, *Supra* note 30, Vol. 6, at 428; Ibn Hazm, *Supra* note 28, Vol. 9, at 339-340; Al-Qashirī, *Supra* note 10, at 924; Al-Nawawī, *Supra* note 18, Vol. 4, at 506.

<sup>77</sup> Shaham, *Supra* note 48, at 157-159.

<sup>78</sup> Ibn Qudāmah, *Supra* note 30, Vol. 6, at 429.

<sup>79</sup> Shaham, *Supra* note 48, at 159.

<sup>80</sup> Al-Khatīb, *Supra* note 19, at 142.

be relied upon only in the case of absence of a conclusive proof.<sup>81</sup> In the context of Pakistan this contention is more important as, due to the lack of technical facilities and expertise, there is a greater chance of error.

In Pakistani law medical reports and DNA tests are considered acceptable as evidence of legitimacy.<sup>82</sup> Courts are reluctant to order a DNA test if the child is born during marriage in which case the doctrine of the conjugal bed prevails. In *Khizar Hayat v. Additional District Judge, Kabirwala* the Lahore High Court stated that it is not possible for the courts to order a DNA test in every case regarding legitimacy. The court considered it 'not proper' to order a DNA test as, because of lack of skills and facilities, there is a possibility of error. Because of the sensitivity of the issue, caution is necessary, as an error may lead to stigmatise a child forever. The court said that article 128 of the Qanun-e-Shahadat Order 1984 applies to cases of legitimacy, and birth during continuation of marriage or within two years after a marriage's dissolution is considered a conclusive proof of legitimacy.<sup>83</sup>

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## CONCLUSION

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Nasab (lineage) is the most important right of a child, as other rights like inheritance, maintenance and guardianship depend on her nasab and hence upon the status of legitimacy. In Islamic and Pakistani law paternity can be established by a valid or an irregular marriage, by acknowledgement and evidence. Islam recognizes longer than normal periods of pregnancy when deciding whether a child is legitimate. This lenient attitude is adopted by Pakistani law as well. Pakistani courts quite often follow Hanafi opinions regarding legitimacy, probably because the majority of Pakistani Muslims follow this school. When deciding disputes of paternity the courts do not emphasize technicalities, and they occasionally depart from the rules of Islamic law to hold a child legitimate. There have been cases in which Pakistani courts declared a child legitimate despite the fact that the child was born before expiry of the minimum period of pregnancy.<sup>84</sup>

In Islamic as well as Pakistani law paternity is established only for a legitimate child as deprivation of paternity rights over the illegitimate child is considered a punishment for the father. From the perspective of the child it is not in her interest that she cannot claim any right from her father. The mother alone should not be responsible for the child the responsibility should be shared by both parents. Not to give any paternity rights to the father is justified as it discourages people from having children outside marriage but he should be obliged to fulfil his duties towards the child. An illegitimate child should be capable to claim maintenance from the biological father. Although this approach is favoured by Federal Shariat Court of Pakistan<sup>85</sup> but this is not followed by Pakistani courts.

The Qanun-e-Shahadat Order 1984 deals with parentage issues in Pakistan. It has included all important points of Islamic law regarding parentage, except that in

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<sup>81</sup> Shaham gives detailed account of discussions and opinions of modern Muslim jurists about acceptability of DNA tests. Shaham, *Supra* note 48, at 170-174.

<sup>82</sup> *Muhammad Shahid Sahil v. the State*, PLD FSC 215 (2010).

<sup>83</sup> *Supra* note 54. Also see *Muhammad Arshad v. Sughran Bibi*, PLD Lahore 302 (2008).

<sup>84</sup> *Supra* note 21.

<sup>85</sup> *Supra* note 16.

this Act no distinction is made between regular and irregular marriages. In Hanafi law there is a distinction between these two, and rules with respect to regular and irregular marriages are different. The words 'irregular marriage' should be included in section 128 because the children born of an irregular marriage are legitimate. Pakistani law is silent about acknowledgement of paternity. Lack of detailed legislation gives the courts huge discretion which results in contradictory decisions on these issues. There is a need to formulate a detailed legislation to cover all points of Islamic law.

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